JTF MEETING – JUNE 2012

RIGHT-OF-WAY EASEMENT ISSUE PAPER

ISSUE: What process must a State Wildlife Agency follow in order to grant a right-of-way easement for access to a third party on State wildlife lands purchased in part with Wildlife Restoration grant funding?

BACKGROUND: It has become apparent that there are many instances where State Wildlife Agencies have been requested by third parties to grant right-of-way easements across State wildlife areas, purchased in part with federal Wildlife Restoration grant funding. Thus the question has arisen as to whether the granting of such a right-of-way easement, where the State Wildlife Agency continues to hold a possessory interest in the lands over which the right-of-way easement is granted, constitutes a "disposition of real property," in which the State agency must seek disposition instructions from the U.S. Fish and Wildlife Service under 50 CFR 80.137.

This particular issue was the subject of recent federal litigation involving the State of Maine's granting of several third party right-of-way easements over State Wildlife lands, purchased in part with federal Wildlife Restoration grant funding, stretching back over nearly half a century. A Citizens' group filed suit against the State of Maine for "illegally" granting the easements and against the FWS for not disqualifying the State from participating in the Wildlife Restoration program due to the State's "illegal" granting of the easements over State wildlife lands.

Just this past March, the U.S. Court of Appeals for the First Circuit, upheld the decision of the Maine Federal District Court in *Scarborough Citizens v. U.S. Fish and Wildlife, et al.*, 674 F.3d 97 (1st Cir. 2012). Specifically, the Court ruled that neither the Wildlife Restoration Act nor its implementing regulations require that the FWS take action against a State which may have violated provisions of the Act or its implementing regulations; and, it also confirmed the obvious, that the FWS was not required to perform NEPA in a situation in which it did not make a decision or take an action.

In reaching its decision the Court focused on the discretion the FWS had in implementing the Wildlife Restoration program, and pointed to the so-called "Chevron deference" a federal agency has in interpreting the regulations it has promulgated pursuant to such statutes. Of particular note in the context of the issue at hand, in dicta (part of a judicial decision that goes beyond the essential elements of a case necessary to reach a decision) the Court pointed out that it did not believe the easements granted by the State of Maine were necessarily the type of real property disposals required by regulation to be approved by the FWS. The Court stated:

> Although deliberate inaction might in some cases be subject to NEPA, 40 C.F.R. § 1508.18 (2011); Mayaguezanos por la Salud y el Ambiente v. United States, 198 F.3d 297, 301 (1st Cir. 1999), it is unclear that the grant of the easement required federal "approval" at all. The only relevant regulatory provision mentioning federal approval is that governing disposal, but the Trail segment in question was or will be paved--not sold or otherwise relinquished--and the disposal regulation is not applicable here. See note 2, above.

Note 2 states:

> We also reject Scarborough Citizens' reliance on section 2 80.14(b)(3), the disposal provision. None of the easements here was a "disposal" of the property as the regulations use the term--a label for what happens to property only after the formalized process described in the regulations, to which both the state and federal agencies explicitly agree, occurs.

Clearly this opinion from the U.S. Court of Appeals, First Circuit, confirms the FWS's broad discretion in administering the Wildlife Restoration Act and its implementing regulations, and specifically, it has indicated that that the real property disposal regulations do not necessarily apply to a State's granting of right-of-way easements to third parties.

OPTIONS: In deciding on a policy for such easements, the two basic options which were already identified at the last JTF meeting are:

- **Option 1:** The granting of such a right-of-way easement over such lands (i.e. allowing the use of a road for access to an adjourning property owned by a third party) is the disposition of real property (defined at 50 CFR 80.2) that is no longer useful or needed for its original purpose (under 50 CFR 80.137) and in which the State must ask the Regional Director (FWS) for disposition instructions under 43 CFR 12.71 (which triggers a NEPA analysis).

  If this option were to be adopted it may be a good idea for the FWS to develop a specific categorical exclusion for the approval of such right-of-way easements that are of a small scale, have little impact, and are non-controversial.

- **Option 2:** The granting of such a right-of-way easement is essentially a commercial, recreational, or other secondary use of a grant funded parcel of land, that may or may not interfere with the authorized purpose of the grant which provided the funds with which the parcel of land was purchased (see 50 CFR 80.134(d)). If the easement does not interfere with the authorized purpose of the grant, then no further action is required. If the easement does interfere with the authorized purpose of the grant, then the State agency must restore the real property to its authorized purpose under 50 CFR 80.135.

  If this option were adopted there are a number of possible policy consideration that have been suggested that could help ensure that a right-of-way does not interfere with the purpose for which the land was originally purchased and that would also ensure that any funds generated from the granting of such easements are retained by the State Fish and Wildlife agency:

  1. States should be reminded that there is a low threshold for what may constitute interference with the purpose for which land was originally acquired. FWS would be available to review proposed easements and advise whether such a use would pass that threshold. (This would not constitute agency action.)

  2. The State should notify the FWS when such easements are granted and provide copies of the easements to be filed with land and grant documents. This would be useful when audit findings question the use of a right-of-way.

  3. When granting an easement the State should be encouraged to make a specific determination that the easement will not interfere with the purpose for which the land was acquired. This would also be helpful for auditing purposes.

  4. When revenues are generated from the granting of easements, in most cases such revenue should be treated as program income or license revenue. States should be certain that the State Fish and Wildlife agencies retain control over such funds.

A third option has been suggested involving a tiered approach, making available a menu of right-of-way interests which a State could provide a third party ranging from the least permanent to most permanent.

- **Option 3:** A range of right-of-way options could be provided which a State could utilize in granting a third party access across State Wildlife lands, ranging from the least permanent to the more permanent:

  1. A License
  2. A Lease, subject to renegotiation after a term of years
  3. A Term Easement, subject to negotiation after a term of years
  4. A perpetual easement, subject to conditions that would ensure that the easement did not interfere with the purpose of the grant

5. A perpetual easement without conditions
6. A Fee Title transfer

The less permanent options, with provisions ensuring that the use would not conflict with the wildlife management purposes of the area (1-4) would not have to be approved by the FWS Regional Director, while the more permanent, unrestricted options (5-6) would require the approval of the FWS Director.

Note: Prior to April 29, 2012, the Fish and Wildlife Manual, at 522 FW 6, had a provision stating that a State must obtain the approval of the FWS Regional Director prior to granting easements through Federal Aid acquired lands. (This policy provision was apparently not referenced in the *Scarborough* case discussed above). In light of the exigencies of dealing with the easements in Maine and the ongoing JTF discussions of easement policies, the FWS amended 522 FW 6, on April 29, 2012, to delete this provision (522 FW 6.7E). A copy of the amendment is attached.